

File order

BEFORE THE
STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS

Application of Gerard M. Dellemann for a Permit)	Case No. 3-SE-95-243
to Place a Pea Gravel Blanket on the Bed of)	
Potters Lake, Town of East Troy, Walworth County,)	
Wisconsin)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Gerard M. Dellemann applied to the Department of Natural Resources for a permit to place a pea gravel blanket on the bed of Potters Lake in Walworth County. On April 18, 1995, the Department issued an order denying the application. On May 13, 1995, the Department received a Petition for Hearing from Mr. Dellemann pursuant to sec. 227.42, Stats.

On May 30, 1995, the Department of Natural Resources granted the request for a contested case hearing. On January 8, 1996, the Department filed a request for hearing with the Division of Hearings and Appeals. Pursuant to due notice a hearing was conducted in Elkhorn, Wisconsin on March 14, 1996, before Mark J. Kaiser, Administrative Law Judge. Subsequent to the hearing, the parties filed written closing argument. The last submittal was received on April 9, 1996.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

Gerald M. Dellemann, Applicant
W791 Potters Circle
East Troy, Wisconsin 53120-9999

Wisconsin Department of Natural Resources, by

Edwina Kavanaugh, Attorney
P. O. Box 7921
Madison, Wisconsin 53707-7921

PRELIMINARY MATTERS

At the hearing, Mr. Dellemann offered a chart he prepared as an exhibit. This chart was marked exhibit 10. The Department objected to the exhibit on the basis of lack of foundation. Mr. Dellemann indicated that the information on the chart was taken from the book Fishes of Wisconsin by George Becker. He was given an opportunity to provide the foundational information for exhibit 10 along with his closing argument.

Mr. Dellemann did submit along with his closing argument ten pages from Fishes of Wisconsin. The first page, Mr. Dellemann submitted has already been admitted to the record as exhibit 30. The additional nine pages will be admitted as well and attached to exhibit 30. With this foundation exhibit 10 will also be admitted. The Department in its response to Mr. Dellemann's argument in submitting exhibit 10, attached four additional pages from Fishes of Wisconsin (labelled exhibit "A"). These pages provide further explanation related to the distribution maps in the book and information about the source of the statistics in the book. These four pages will also be admitted to the record as exhibit 31.

The deadline for filing closing argument was postmarked by March 28, 1996. The Department's closing argument was postmarked March 29, 1996. By letter dated April 3, 1996, Mr. Dellemann requested that the Department's closing argument not be considered because it was not timely filed. This request is denied. Although the Department's closing argument was apparently filed a day late, this delay did not prejudice Mr. Dellemann. The schedule did not provide for a response by Mr. Dellemann nor was the closing argument filed after the Department received Mr. Dellemann's closing argument. The Department did not have an opportunity to review Mr. Dellemann's closing argument before filing theirs. Additionally, the filing of the Department's closing argument was not the final submittal in this matter so the filing of the closing argument did not affect the timeliness of the issuance of this order.

FINDINGS OF FACT

1. Gerard Dellemann owns property along the shore of Potters Lake in Walworth County. The legal description of the property is the SE 1/4 of the SW 1/4 of Section 11, Township 4 North, Range 18 East, Town of East Troy, Walworth County. The street address of the property is W791 Potters Circle, East Troy, Wisconsin, 53120, also known as Lot 3, Koenig Court subdivision. The property has 210 feet of frontage along Potters Lake.

2. Mr. Dellemann (applicant) filed an application, pursuant to sec. 30.12(3), Stats., with the Department of Natural Resources (Department) on April 11, 1995, seeking a permit to place a six inch layer of pea gravel on the bed of Potters Lake. The proposed pea gravel blanket will stretch seventy feet along the shoreline of Potters Lake and extend thirty feet lakeward into Potters Lake. The water depth at the lakeward edge of the proposed pea gravel blanket is approximately two feet. The purpose of the pea gravel blanket is to create

an improved beach and swimming area adjacent to the Dellemann property. The Department and the applicant have complied with all procedural requirements of sec. 30.02, Stats.

3. Potters Lake is navigable at the project site. No bulkhead line has been established for Potters Lake.

4. The lake bed at the proposed project site consists of organic muck. The placement of pea gravel at this location will cover the organic substrate at this location and destroy any aquatic plants growing on the lake bed in the area of the proposed project and vegetation along the shoreline which will be covered for the proposed beach.

5. The covering of the lake bed and destruction of aquatic plants will negatively impact on use of the area as spawning and nursery habitat for northern pike. Although the proposed project will only affect approximately 2100 square feet of lake bed, spawning and nursery habitat for northern pike is becoming increasingly rare in southeastern Wisconsin. The proposed project will have a cumulative impact with respect to loss of spawning and nursery habitat for northern pike

6. Loss of aquatic and shoreline vegetation at the site of the proposed project may also have adverse impacts on use of the area as habitat for other game and forage fish and as wildlife habitat for waterfowl, wading birds and shore birds at the project site.

7. The Department presented credible testimony that much of the project site has a lake substrate consisting of soft muck and sediment which is greater than six inches deep. A six inch layer of pea gravel placed at these locations will sink completely into the muck. Based on the testimony of the witnesses for the Department, the proposed project will result in the destruction of wildlife habitat and will most likely not achieve the benefit sought by the applicant.

8. The property is located along a small finger bay on the southeastern side of Potters Lake. The adjoining shore surrounding this bay is a wetland area classified as an E2H type of wetland. An E2H wetland is characterized by the presence of emergent types of vegetation, such as cattails and rushes. The beach portion of the proposed project will extend partially into the wetlands. The portion of the project which extends into wetlands will adversely impact the wildlife habitat values of that portion of the wetland.

9. Creation of a beach and swimming area is not a wetland dependant activity. Additionally, a practicable alternative exists which will not result in adverse impacts to the functional values of the affected wetlands. The alternative is using a swimming and beach area located adjacent to lot 1 of the subdivision. Mr. Dellemann, along with other property owners in the Koenig Court subdivision, owns an undivided interest in lot 1. A portion of the frontage of lot 1 has been developed as a swimming area for use by the joint owners of the lot.

10. The portion of the proposed project involving placing a layer of pea gravel on the bed of Potters Lake is detrimental to the public interest in preserving wildlife habitat.

11. The proposed project will not materially impair navigation.

12. The portion of the proposed project involving placing a layer of pea gravel in the wetland to create a beach does not satisfy the requirements of Ch. NR 103, Wis. Adm. Code.

13. The Department has complied with the procedural requirements of § 1.11, Stats., and Chapter NR 150, Wis. Adm. Code, regarding assessment of environmental impact.

CONCLUSIONS OF LAW

1. The applicant is a riparian owner within the meaning of § 30.12, Stats.

2. The proposed project described in the Findings of Fact requires a permit pursuant to sec. 30.12(3)(a), Stats.

3. The proposed project will be detrimental to the public interest in navigable waters because it will result in the destruction of aquatic vegetation and wildlife habitat.

4. The uplands adjacent to the project site are "wetlands" within the definition set forth at sec. NR 103.02(5), Wis. Adm. Code.

5. The proposed project also affects the wetlands. Whenever a wetlands will be affected the requirements of Ch. NR 103, Wis. Adm. Code, must also be satisfied. If an activity is not wetland dependent and a practicable alternative exists which will not adversely impact wetlands and will not result in other significant adverse environmental consequences, sec. NR 103.08(4)(a), Wis. Adm. Code, requires a finding that the requirements of Ch. NR 103, Wis. Adm. Code, are not satisfied.

6. The project is a type IV action under sec. NR 150.03(8)(f)4, Wis. Adm. Code. Type IV actions do not require the preparation of a formal environmental impact assessment.

7. The Division of Hearings and Appeals has authority under secs. 30.12 and 227.43(1)(b), Stats., and in accordance with the foregoing Findings of Fact, to issue the following order.

ORDER

The order dated April 18, 1995, issued by the Department of Natural Resources denying the application of Gerard Dellemann is affirmed.

Dated at Madison, Wisconsin on May 9, 1996.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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By Mark Kaiser
MARK J. KAISER
ADMINISTRATIVE LAW JUDGE

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.